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Utah Supreme Court

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Ray, Quinney & Nebeker; C. Preston Allen; Attorneys for Respondent;

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UNIVERSITY UTAH

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

OCT 24 1957

LEDA COMBE,

Clerk, Supreme Court, Utah

Appellant,

vs.

Case No.
8705

UTAH CONSTRUCTION COMPANY,

Respondent.

BRIEF OF RESPONDENT

RAY, QUINNEY & NEBEKER,
C. PRESTON ALLEN,
Attorneys for Respondent

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IN THE SUPREME COURT of the STATE OF UTAH

LEDA COMBE,

Appellant,

vs.

UTAH CONSTRUCTION COMPANY,

Respondent.

Case No.
8705

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Statement of Facts set forth in the appellant's brief are cursory but in most instances conform to the record. We believe, however, it will assist this Honorable Court if the statement of facts are enlarged.

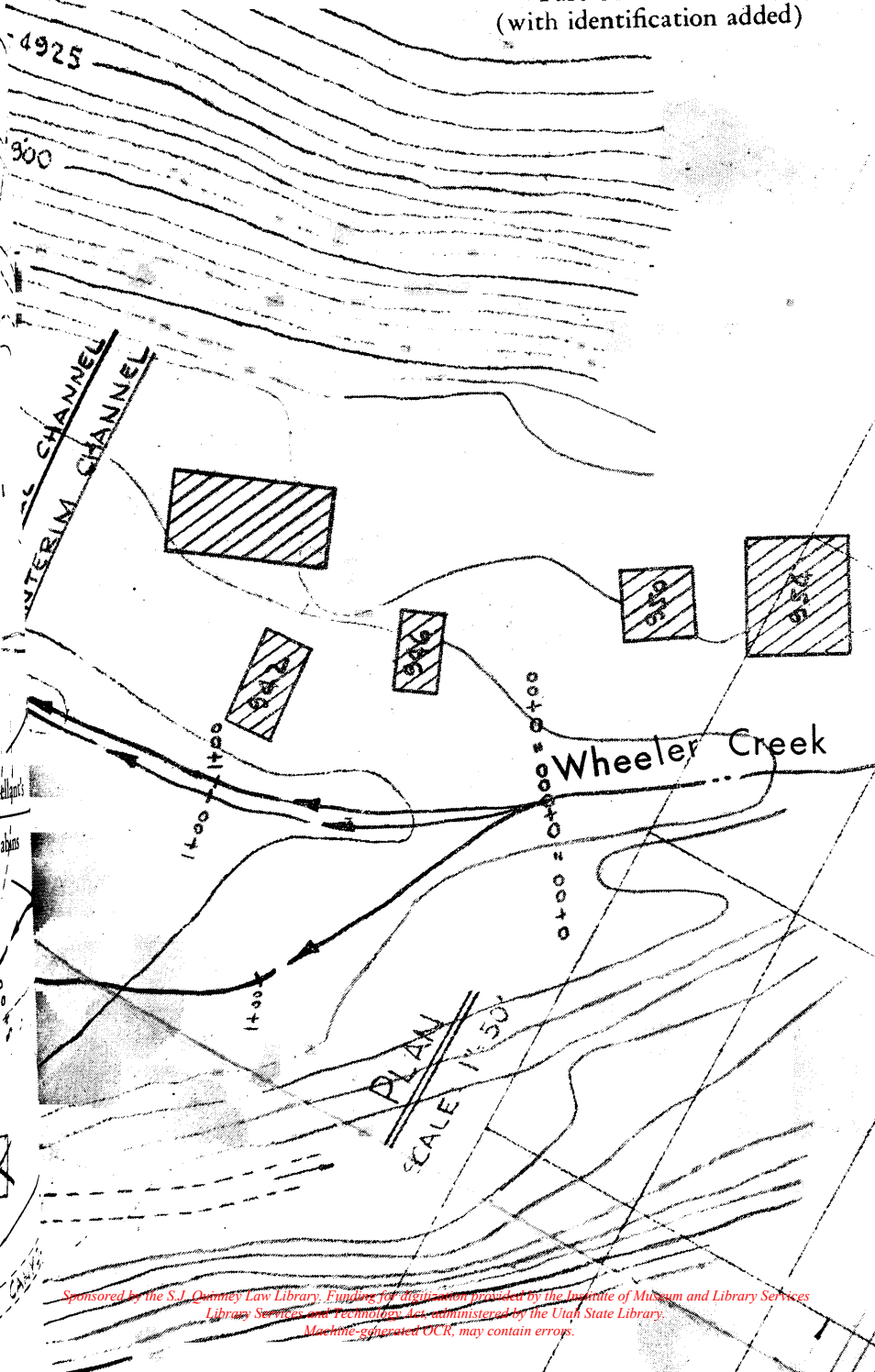
Huntsville Highway

Detour

Appellant's
Cabins

BURNED
OUT
CONCRETE
FOUNDATION

Part of Exhibit 13
(with identification added)



The appellant, Leda Combe, owned a parcel of real property at the mouth of Wheeler Canyon, Weber County, Utah, upon which three canyon cabins had been placed or erected many years before December 23, 1955. Down Wheeler Canyon flowed a small creek which entered the Ogden River just below Pine View Dam and which creek, prior to December 23, 1955, followed a stream bed immediately to the east of the appellant's property. (See area map on brief, pages 2 and 3)

Some distance down-stream and north of appellant's property and at a lower elevation, Wheeler Creek passed under the Huntsville highway through a culvert and then flowed into the Ogden River. (Ex. 12)

The respondent was engaged during 1955 in work on Pine View Dam. (T. 44) Due to the work on the dam and to the proximity of the Huntsville Highway at the point where it passes the mouth of Wheeler Canyon, it was necessary to regrade and elevate that portion of the highway. To facilitate this regrading, the respondent constructed an earth-filled detour immediately to the south of the existing highway and placed under the detour a culvert thirty inches in diameter to allow the flow from the creek to pass under the detour. The traffic then traveling Ogden Canyon was diverted over the detour and the regrading of the existing Huntsville Highway commenced.

The culvert which had been installed by the respondent under the detour and which was designed to handle the flow of water down Wheeler Creek during the month

of December, 1955, had a carrying capacity of approximately forty cubic feet of water per second. (R. 104) The maximum water flow down Wheeler Creek during December, 1955, and prior to the 23rd, occurred on the 1st, 2nd, 3rd, 8th, 9th, 12th, 14th, 18th, 20th, 21st and 22nd, and was measured by the Ogden River Water User's Association on each day at only $1\frac{1}{2}$ cubic feet per second. (Ex.12) The records of the Association further disclose that the maximum recorded flow during any December prior to December, 1955, was only 9.1 cubic feet per second, or less than one-fourth of the carrying capacity of the culvert installed by the respondent. (T. 69)

For a couple of days prior to December 23rd, 1955, appellant's witness, Delyle Muir, testified a "real heavy, wet snow and rain" storm occurred in the area. (T. 37) On December 23rd, 1955, Wheeler Creek was discharging 70 cubic feet of water per second, an amount exceeding by seven and one-half ($7\frac{1}{2}$) times all previous recorded flow for December. (Ex. 5) On the 24th of December, 1955, the flow of water down Wheeler Creek had increased to 134 cubic feet per second; on the 25th of December the flow was up to 211 cubic feet per second, at which point, the flow was substantially maintained through the 27th of December. (Ex. 5) On the 28th of December the stream flow dropped to 14 cubic feet per second and generally receded thereafter. (Ex. 5) David A. Scott, a witness for the respondent, who was the Superintendent for the Ogden River Water Users Association, when asked if he had an opinion as to whether the flow of 211 cubic second feet of water could have been reasonably anticipated in December, 1955, replied: (Tr. 77)

“Yes. We never have had it before. Something very unusual.”

By 9:00 A.M. on December 23, 1955, the flood water was running over the lowest point of the detour constructed by the defendant (Ex. 3), (R. 87). And by 3:00 p.m. of the same day, the flood water had completely washed out the detour (Ex. 4), (R. 87). This eliminated the puddling or backing-up of the water behind the detour. (Ex. 4)

The low point on the detour constructed by the respondent was 4843 feet above sea level. (R. 105) The lowest point above sea level of appellant's real property was higher than 4845 feet (R. 105) and her cabins were at yet a higher elevation. (R. 106) In other words, appellant's property was at an elevation two feet higher than the point on the detour over which the flood waters flowed.

None of the witnesses at the trial testified that the backing-up of water behind the detour constructed by the defendant caused any damage to the appellant's cabins. On the contrary, the only statements in the record pertaining to proximate cause were made by appellant's own witness, Thomas J. Taylor, who testified as follows: (Tr. p. 59-61)

“CROSS EXAMINATION

BY MR. ALLEN:

Q Mr. Taylor, I assume that you inspected both the outside and the inside of Mrs. Combe's cabins?

A That's right.

Q And your observations were detailed, I take it?

A No. I wasn't asked to make a detailed appraisal. I was asked to look at the cabins. Go through them. I did note that they were a typical, you might say summer cabin, that wasn't built structurally such as a home would be here in Ogden. They are more frail, and of course the damage to the cabins was apparent, from the rock and logs and whatnot that are inside them and around them. I noticed a few roots and pieces of logs that had been flooded.

Q Did you notice on the tar-paper shack that a log had pierced the wall to the south?

A I didn't notice that particular point in the cabin, no.

Q You didn't see that?

A I may have seen it. I don't recall that particular spot.

Q Did you notice that damage had occurred, by reason of the rocks, to the outside of the cabins?

A The main damage, as I could see it, was the fact that the *pressure dislocated* some of the paneling within the cabins. The floors were still damp and in some places there was, I would estimate, *two to two and a half feet of fairly good sized rocks and pieces of roots and other things that had been washed down.*

Q Now you mentioned dislocation from the pressure. Could you tell me from what direction that pressure came, in your observation?

**** (objection of counsel—over-ruled)

A I didn't notice, but I know by the direction of the stream. *It would have to come from upstream naturally, because you could see it was flood damage or water damage.*

Q I see. Were you able to make a determination as to the direction that the debris came into the cabins?

A Yes, I think that could be readily ascertained by looking at the—*In other words most of the debris was on the east, or rather the south end of the cabins, indicating that the water had come from that side, and the blocking of the walls had made that debris settle on the south walls of the cabins.*" (emphasis ours)

In addition, and contrary to appellant's statement of facts, the record is devoid of any evidence which demonstrates that the water at any time backed up to a point where it touched the appellant's real property. It is true that flood waters flowed down, against and by the appellant's property as can readily be seen in Exhibit 4, but the diversion of the water occurred some 500 feet further south and upstream of the detour and was caused by the natural spreading of the water after the old stream-bed had been clogged up with a tree stump. (Tr. 137, 132, Ex. 15)

Appellant stated in the last sentence of his statement of facts that "water continued to back up for several days." No citation to the record is made for this statement and we believe it was made through inadvertance.

Based upon the foregoing record, the respondent moved the Court at the close of the evidence to direct a

verdict in favor of the respondent and against the appellant on the following grounds:

1. The appellant had failed to prove negligence as alleged in the complaint.

2. There was no showing that any alleged negligence on the part of the respondent proximately caused the alleged damage.

3. The evidence was undisputed that the respondent had taken all reasonable measures and precautions to assure the passage of the anticipated flow of water down Wheeler Creek, and had provided a margin of safety in excess of four times the theretofore recorded flow for December.

4. The evidence was undisputed that the damage to the appellant's property and improvements occurred upstream of the detour constructed by the respondent, and as a consequence, exclusively, of a force majeure.

5. The evidence was undisputed that the universally accepted laws of nature and gravity completely refuted the appellant's claims of causation.

After argument on this motion, the lower court directed the jury to return a verdict in favor of this respondent, no cause of action.

STATEMENT OF POINTS RELIED UPON

POINT NO. I

THE TRIAL COURT PROPERLY RULED THAT THERE WAS NO SUBSTANTIAL EVIDENCE IN

THE RECORD WHICH WOULD SUPPORT A FINDING THAT THE RESPONDENT WAS NEGLIGENT.

POINT NO. II

THE SOLE PROXIMATE CAUSE OF THE DAMAGE TO APPELLANT'S PROPERTY WAS A FORCE MAJEURE.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY RULED THAT THERE WAS NO SUBSTANTIAL EVIDENCE IN THE RECORD WHICH WOULD SUPPORT A FINDING THAT THE RESPONDENT WAS NEGLIGENT.

The rule as to when a trial court may direct a verdict is well settled in Utah and is succinctly set forth in the case of *Jackson vs. Colston, et al*, 116 *Utah*, 295, 209 P. 2d 566, *wherein* the court states:

“ * * * the court is required to direct a verdict unless there is evidence from which the jury could reasonably find in favor of the plaintiff.”

Paragraph 3 of the appellant's complaint alleges that this respondent had negligently obstructed an entrance to a culvert which, according to paragraph 4 of said complaint, caused the waters that *normally* flow through the culvert to back-up and flood the canyon cabins located on the appellant's property.

In view of the complaint, the appellant had the initial burden at the trial of showing that the respondent was negligent. If there was no substantial evidence in support of this essential showing, the directed verdict must be affirmed on appeal. See *Utah State National Bank v. Livingston, et al*, 69 Utah 284, 254 P. 781.

Negligence is not presumed. It must be proven by a preponderance of the evidence and the burden is upon the person alleging the negligence to meet this burden. These rules are so well established as to not require citation.

The record in this case clearly sets forth the following:

1. The respondent constructed a detour to the south of the main Huntsville Highway and over Wheeler Creek.

2. That this detour construction activity took place in the month of December, 1955, and, as a matter of law, the respondent had the right to construct the detour.

3. That the culvert installed by the respondent to handle the flow of Wheeler Creek during the month of December, 1955, would properly carry off a flow of 40 cubic feet of water per second, which was in excess of 4 times all previously recorded flow down Wheeler Creek during the month of December.

4. That the appellant introduced no evidence to show that the culvert, as installed by the respondent, did not conform to the reasonable standards in the construction industry, nor did the appellant introduce any evidence which would show that a reasonably prudent person, informed on the facts, would not have constructed

the detour and installed the culvert just as the respondent did.

To the contrary, it appears from the record that the respondent has affirmatively established beyond dispute that all of its acts regarding the construction of the detour and the installation of the culvert conformed, with a wide safety margin, to the conditions of water flow which could reasonably have been anticipated at the time of year in which this construction activity was pursued.

It seems evident, therefore, that the trial court properly directed a verdict in favor of the respondent on the ground that the appellant did not introduce any evidence in the record to support a finding of negligence.

POINT II.

THE SOLE PROXIMATE CAUSE OF THE DAMAGE TO APPELLANT'S PROPERTY WAS A FORCE MAJEURE.

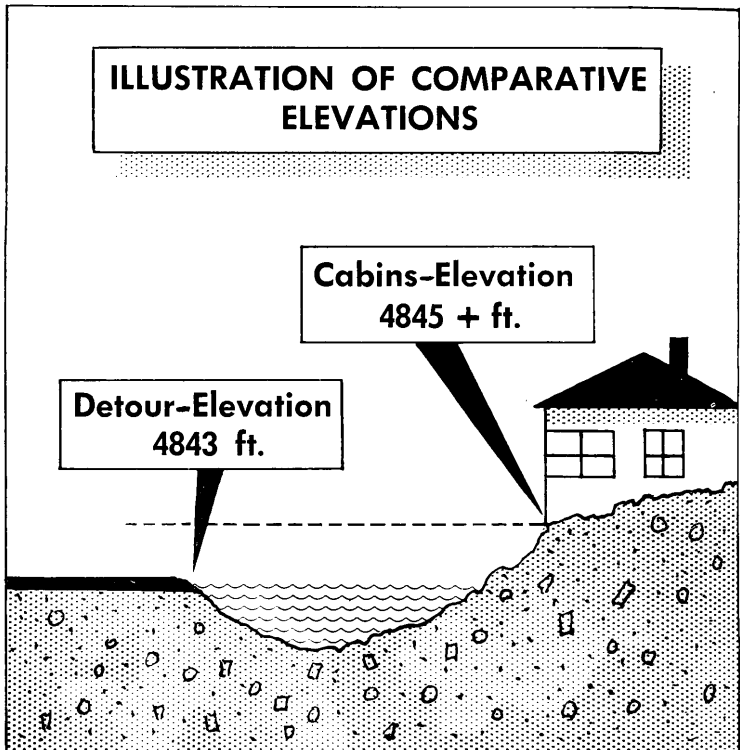
The law is well settled that people do not incur liability for failure to provide for unexpected, unprecedented and overwhelming forces in nature. See 38 *Am. Jur.* 649. The obligation imposed by law to protect the property of others is imposed only for those forces of nature which the ordinarily prudent person would anticipate and prepare to meet and provide for. As stated in *Asher v. Pacific Electric Ry. Co.*, 187 *Pac.* 976,

“But there is no liability for floods which would surprise ordinary caution. The company is not bound to provide against such extraordinary floods

as have never been known to occur, and which competent and skilled engineers could not reasonably anticipate.”

The record here establishes that the highest recorded flow of water down Wheeler Creek during any December prior to December 23, 1955, was 9.1 cubic feet per second. An inspection of the Ogden River Water User's records, by the respondent, would have revealed in December, 1955, that a culvert handling 40 cubic second feet of water would not only be sufficient to control all reasonably foreseeable streamflow, but would provide a margin of safety in excess of four times the highest previously recorded flow. This was the basis of the decision of the respondent in installing the 40 cubic second foot culvert. As this record shows, during the height of the unprecedented flood down Wheeler Creek, the maximum flow registered 211 cubic second feet. This quantity and force of water, as stated by the Superintendent of the Ogden River Water User's Association, would not reasonably be anticipated.

In addition, Mr. Taylor, an expert called by the plaintiff to testify, after an inspection of the premises, stated that in his opinion the damage to the appellant's property occurred from the force of the flood and the debris carried by the water being driven against the south sides of the plaintiff's cabins. All of the evidence in the record, together with all reasonable inference taken therefrom would not allow a conclusion to be drawn that anything this respondent did in constructing a detour below the appellant's property in any way caused damage to the appellant's cabins.



Further, the simple rules of gravity and physics, when applied to the facts in this lawsuit and the position of the appellant, relegate her record to this simple statement—if water will run uphill, appellant might have established a jury issue. This statement is based upon the evidence in the record to the effect that appellant's improvements are located at a point which is over two feet higher than the place upon the detour where the flood waters were carried off. In other words, if the damming of waters by the defendant's detour would ever reach the lowest point on

the cabins of the appellant, the water would have to back-up on an inclined plane sloping upwards towards the appellant's cabins.

Plainly and simply, nature does not work that way.

It, therefore, follows that the damages to the appellant's property arose solely and exclusively, as testimony by the plaintiff's witness, Mr. Taylor, shows, through the force of the flood waters coming down Wheeler Creek and against the improvements erected on her property—not from flood water backing up behind the respondent's detour.

CONCLUSION

The respondent takes no issue with the cases cited by the appellant, and in most respects we believe they precisely support the position of the respondent. This case does not have to be argued on the basis of precedents or conflicting theories of law. Elementary rules of nature and gravity, recognized by all courts, vividly demonstrate that this respondent could not be charged with the damages caused by a display of nature merely on the ground that the respondent happened to be an on-looker in the vicinity.

It necessarily follows that the ruling of the lower court must be affirmed.

Respectfully submitted,

RAY, QUINNEY & NEBEKER.
C. PRESTON ALLEN,
Attorneys for Respondent